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SEP 30 2004

OFFICE OF PETITIONS

In re Application of :
Garcia, et al. : DECISION ON PETITION
Application No. 09/030,518 :
Filed: February 23, 1999 :
Atty. Dkt. No.: 78635 :

This is a decision on the petition under 37 CFR 1.137(a), filed March October 2, 2002, to revive the above-identified application.

The petition is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)." This is not a final agency decision.

This application became abandoned June 3, 1999 for failure to timely file a proper response to the Notice of Allowance and Issue Fee Due mailed March 2, 1999. The Notice set a three (3) month statutory period of time for reply. Notice of Abandonment was mailed July 24, 2000.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(1); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c).

The petition lacks requirement (1) set forth above. The fee transmittal submitted herewith only authorizes a total payment of \$1,320.00 (\$110.00 petition fee and \$1,210.00 issue fee). The current issue fee for a large entity is \$1,330.00. Thus, any

renewed petition must be accompanied by the required issue fee, currently \$1,330.00.

The present petition lacks requirement (3) set forth above. Petitioner has failed to present a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable.

The Office may revive an abandoned application if the delay in responding to the relevant outstanding Office requirement is shown to the satisfaction of the Commissioner to have been "unavoidable." See, 37 CFR 1.137(a)(3). Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term "unavoidable" "is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business"); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). A petition to revive an application as unavoidably abandoned cannot be granted where petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2d 1130 (N.D. Ind. 1987).

Petitioners allege an issue fee transmittal was timely submitted on April 6, 1999. Petitioners further allege to have included a copy of the issue fee transmittal bearing a certificate of mailing with the instant petition. Petitioners suggest that the issue fee transmittal has been lost in the mail.

A review of the official application file does not indicate receipt of the allegedly filed issue fee transmittal. While petitioners allege a copy of the issue fee transmittal was enclosed with the instant petition, the petition as received did not include said transmittal.

Under the provisions of 37 CFR 1.8(a), correspondence is considered timely filed if: (1) the correspondence is mailed or

transmitted prior to expiration of the set period for response by being properly addressed to the Patent and Trademark Office as set out in 37 CFR 1.1(a) and deposited with the U.S. Postal Service with sufficient postage as first class mail or transmitted to the Patent and Trademark Office in accordance with 37 CFR 1.6(d) **and** (2) that the correspondence includes a certificate for each piece of correspondence stating the date of deposit or transmission.

Further, under 37 CFR 1.8(b), in the event that correspondence is considered timely filed by being mailed or transmitted in accordance with 37 CFR 1.8(a), but not received in the Patent and Trademark Office, and the application is held to be abandoned or the proceeding is dismissed, terminated, or decided with prejudice, the correspondence will be considered timely if the party who forwarded such correspondence: (1) informs the Office of the previous mailing or transmission of the correspondence promptly after becoming aware that the Office has no evidence of receipt of the correspondence; (2) supplies an additional copy of the previously mailed or transmitted correspondence and certificate; and (3) includes a statement which attests on a personal knowledge basis or to the satisfaction of the Commissioner to the previous timely mailing or transmission. The Office may require additional evidence to determine if the correspondence was timely filed. See, MPEP 711.03(c).

Petitioners have failed to provide sufficiently supporting evidence that the issue fee transmittal and issue fee payment were timely filed in accordance with the provisions of 37 CFR 1.8 (certificate of mailing). The petition did not include a copy of the previously mailed or transmitted correspondence and certificate as required under 37 CFR 1.8(b)(2). The petition was accompanied by, *inter alia*, a copy of the Notice of Allowance and Issue Fee Due which does not bear a certificate of mailing. The petition did not include a copy of a transmittal form bearing a certificate of mailing in accordance with 37 CFR 1.8. Accordingly, it can only be concluded that the issue fee was not timely filed.

Any renewed petition must be accompanied by evidence to sufficiently establish that the entire period of delay in responding to the Office communication was unavoidable. The evidence should establish that a response to the Notice was timely mailed to the Office by means of USPS First Class mail

and should include a copy of the original issue transmittal alleged to have been timely filed. As the petition was not accompanied by an issue fee transmittal, enclosed please find a copy of Part B - Fee Transmittal as a courtesy.

The required petition fee has been charged to deposit account No. 50-0833.

ALTERNATE VENUE

Petitioner is urged to consider filing a petition stating that the delay was unintentional. Petitioner's attention is directed to 37 CFR 1.137(b) which provides for the revival of an "unintentionally" abandoned application without a showing that the delay in prosecution or in late payment of an issue fee was "unavoidable". An "unintentional" petition under 37 CFR 1.137(b) must be accompanied by the required petition fee and reply.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

Further correspondence with respect to this matter should be addressed as follows:

By mail:

Mail Stop Petition

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

By facsimile:

(703) 872-9306

By hand delivery or:
courier service (FedEx,
UPS, DHL, etc.)

U.S. Patent and Trademark Office
220 20th Street S.
Customer Window, **Mail Stop Petition**
Crystal Plaza Two, Lobby, Room 1B03
Arlington, VA 22202

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Telephone inquiries concerning this matter may be directed to the undersigned at (571) 272-3205.

A handwritten signature in cursive script, appearing to read "Alesia M. Brown".

Alesia M. Brown
Senior Petitions Attorney
Office of Petitions